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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-806

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Respondents.

BRIEF AMICUS CURIAE OF NATIONAL CONSUMER FINANCE ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF NATIONAL CONSUMER FINANCE ASSOCIATION [1]

The National Consumer Finance Association (hereinafter referred to as "NCFA"), organized in 1916, is a national trade association of companies engaged in the consumer credit business, representing over 1,000 member companies operating over 18,600 loan and finance offices. It represents organizations ranging from a single small office to substantial nationwide chain organizations. The business of these companies is primarily direct credit

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[1] By letter dated November 14, 1973, the Solicitor General of the United States consented to the filing of this Brief; by letter dated November 16, 1973, counsel for the Petitioners likewise consented. Copies of this correspondence have been filed with the Clerk.

lending to consumers and the purchase of sales finance paper on consumer goods. However, some members have retail subsidiaries, others are subsidiaries of manufacturers, others are subsidiaries of highly diversified corporations, and since the 1970 Amendments to the Bank Holding Company Act, especially pursuant to the provisions of 12 U.S.C. § 1843(c)(8), a growing number are subsidiaries of bank holding companies.

The consumer credit business, in which all NCFA member companies are engaged, has been traditionally governed by state statutes and regulations requiring strict formalities with respect to documents, forms, and customer disclosures. Indeed, the "consumer finance industry is still the most heavily regulated segment of the consumer credit industry." Report of the National Commission on Consumer Finance (GPO, Dec. 1972), p. 45. Moreover, Congress, in recognition of legislative responsibilities in the consumer credit area, has in recent years placed certain aspects of the consumer credit business under Federal control, including the Consumer Credit Protection Act, of which the Truth in Lending Act is a part. 15 U.S.C. §§ 1601 *et seq.* (1968). Under the Truth in Lending Act, although the Federal Reserve Board is explicitly charged with responsibility for prescribing implementing regulations (Regulation Z), the Federal Trade Commission has responsibility for enforcing these regulations as to the consumer finance industry. 15 U.S.C. §§ 1604, 1607(c).

Of the $142 billion total consumer installment credit outstanding from all credit grantors at the end of September, 1973, as reported by the Federal Reserve Board, finance companies held $36 billion or over 25% of such credit. It can be readily seen that the companies represented by NCFA hold a significant portion of the total consumer installment credit outstanding in the United States, and thus, they perform an important function in the American economy.

In the last few years the Federal Trade Commission has been engaged in a broad investigation of various trade practices with respect to the extension of credit and debt collection. This activity has focused to a large extent on traditional creditors' remedies, many or all of which are expressly sanctioned by state law. The Federal Trade Commission presently has under consideration the promulgation of industry-wide trade regulation rules which would define and proscribe acts or practices allegedly unfair or deceptive to consumers in connection with the extension of credit and creditors' remedies. These rules would abrogate numerous presently existing state laws and, accordingly, judicial resolution of the unsettled question of the Commission's statutory authority for promulgating such rules is of utmost importance to NCFA.

ARGUMENT

The issue presented in this case, and which should be reviewed by this Court, is whether the Federal Trade Commission Act of 1914 (15 U.S.C. §§ 45 *et seq.*) grants the Federal Trade Commission ("Commission" or "FTC") authority to issue industry-wide trade regulation rules having the binding effect of substantive law to enforce the Act's prohibitions against "unfair methods of competition" and "deceptive practices."

I. Regulation of the Consumer Credit Industry is an Extremely Complex Problem Requiring a Legislative Resolution

Historically, states have closely regulated the consumer credit industry, creating, altering and abolishing various creditors' remedies and debtors' and creditors' rights. In recent years, the rapid growth of the industry has put increasing stress on ancient legal doctrines developed and sanctioned by the states. More recently, the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, expressly con-

ferred rulemaking authority on the Federal Reserve Board to implement meaningful disclosure of credit terms to consumers and to facilitate compliance with the Act. Congress conferred this responsibility on the Board because it possessed the "necessary experience and resources to monitor [the] operation [of the Act]." *Mourning* v. *Family Publication Service, Inc.*, 411 U.S. 356, 365 (1973). Other Federal agencies also exercise varying degrees of supervisory and regulatory authority over various segments of the consumer credit industry (Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, National Credit Union Administration).

Moreover, the Ninety-Second Congress and the current Ninety-Third Congress have had under consideration legislation dealing with many of the same issues being considered by the FTC under its claimed rulemaking authority. On April 17, 1972, the Senate Committee on Banking, Housing and Urban Affairs rejected a measure somewhat comparable to the proposed FTC "holder-in-due-course" rule[2] (S. Rep. No. 92-750 (April 17, 1972), p. 13) stating:

> One of the great virtues of the Federal System of government is the opportunity for subunits of the governmental system to experiment with governmental concepts where they are not preempted by the national government, which process can test many different modes of governing in such areas and lead to superior governing concepts. The question of policy formulation in regard to the "Holder-in-Due-Course Doctrine" appears to be an area which is very suitable for this process, and *the Committee therefore prefers to withhold Federal preemption of policy-making in this field for the present time.* (Emphasis supplied)

[2] 36 Fed. Reg. 1211-12 (January 26, 1971).

Efforts to reinsert these provisions by amendments to the bill were rejected by the full Senate during floor debates. *Cong. Rec.* S6901, D454-55 (daily ed. April 27, 1972).

Over a year later, on July 23, 1973, the Senate passed the Fair Credit Billing Act of 1973, S. 2101 (93d Cong., 1st Sess.) containing a provision (Section 170) analogous to the FTC's revised proposed trade regulation rule on the same subject.[3] However, the Senate bill contained *inter alia* geographic and dollar limitations not contemplated by the FTC.

Significantly, if Congress in 1914 had granted pervasive rulemaking power to the FTC, subsequent creation by Congress of various supervisory and regualtory agencies with jurisdiction over the consumer credit industry would have been to some extent unnecessary and superfluous. The FTC, with its claimed substantive rulemaking power, would have had full authority and power to duplicate activities of at least some of these agencies. Moreover, obvious Congressional doubts about FTC rulemaking authority can be seen from conflicting current legislation dealing with issues identical to those addressed by the FTC's proposed trade regulation rules. Problems and issues in the consumer credit industry are multifaceted in nature and their resolution requires a legislative answer which only Congress can supply.

II. The FTC's Announced Rulemaking Activities Have Created Confusion and Uncertainty Within the Consumer Finance Industry

Because the FTC is attempting to exercise a power neither contemplated nor provided for in its enabling Act of 1914, its announced rulemaking activities create a discriminatory situation among various financial institutions engaged in the extension of consumer credit. For

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[3] 38 Fed. Reg. 892-94 (January 5, 1973).

example, under the FTC Act, banks are exempt from the Commission's jurisdiction to prevent unfair or deceptive acts or practices on consumers. 15 U.S.C. § 45(a)(6). Thus, although all credit grantors engage in essentially similar activities, the FTC's announced rulemaking proposals would apply to one segment of the consumer credit industry while another segment may continue to operate without the restrictions imposed by these proposed rules. Moreover, due to the rather unique and technical problems of the consumer finance industry, Federal regulatory and supervisory agencies with affirmative duties in this area may differ with the FTC as to what constitutes an unfair or deceptive act or practice in the consumer finance field. The FTC's lack of expertise in this area promises to skew the delicate balance of competition in the industry. By issuing blanket rules proscribing and prescribing methods of competition in the consumer credit industry, the FTC will subject one segment of the industry (consumer and sales finance companies and nonbank credit card companies) to rules lacking the depth of expertise governing rulemaking authority in other segments of the industry.

Both Congress and the legislatures and regulatory agencies of the states have continually regulated the consumer finance industry with an understanding of its unique problems. Historically, Congress left this regulatory responsibility primarily in the control of the states while creating numerous Federal supervisory and regulatory agencies to supplement state regulation. A comprehensive regulatory system now governs the consumer finance industry and Congress is currently considering additional legislation designed to resolve industry problems. The FTC's recent announcements and various proposed trade regulation rules have created confusion, conflicting responsibilities, doubts over needed legislation and general uncertainty on the part of both Congress and the state legislatures.

CONCLUSION

If the question decided by the Circuit Court of Appeals with respect to the authority of the FTC to issue trade regulation rules is not resolved by this Court, the uncertainty and confusion surrounding the authority of the FTC to issue legislative-type, substantive rules will persist. Undoubtedly more litigation on this basic question of the FTC's statutory authority will ensue. Only this Court can finally settle this question of national importance to the American economy.

WHEREFORE, for these reasons, the National Consumer Finance Association respectfully submits that the Petition for a Writ of Certiorari should be granted.

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